## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: October 11, 2001

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Region 14

Will Vance, Officer-In-Charge Subregion 33

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Division of Advice

177-1633-5017-0000

SUBJECT: Carpenters Local Union No. 792

177-2484-5000-

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Case 33-CC-1296

This case was submitted for advice on whether carpenters performing work for a general contractor are employees or independent contractors.

## **FACTS**

Robert Campbell ("Campbell") of Robert S. Campbell, Investment Contracting, Inc. is engaged in the business of designing and constructing professional office buildings for dentists and other customers. In mid-2000, Campbell signed a contract with David Larson, a dentist, to construct a new dental office building. On March 1, 2001, Campbell contracted with David Solverson, a union contractor, to perform the framing work on the project. About mid-March, Campbell hired two non-union carpenters, Robert Griffin and Brad Maurer, to do the inside finishing work on the project. Both Griffin and Maurer had previously worked for Campbell, though not recently.

On March 27, after completing 85% of the framing work, Solverson quit the project claiming he was not making enough money. Campbell asked Griffin and Maurer if they would finish the framing work. They reviewed the work and quoted Campbell a price, which he agreed to pay. On April 2, the Union started picketing the construction site using signs that read in part, "Campbell is working on this job with labor receiving less than prevailing rates..."

<sup>&</sup>lt;sup>1</sup> Hereafter, all dates 2001 unless otherwise noted.

Griffin and Maurer continued working on the project until mid-April when they completed their portion of the project.

Both Griffin and Maurer provided their own tools, air compressors and nail guns for their work on the project. They set their own work hours, and would leave the construction site to do work on other projects they had ongoing with other builders. Campbell supplied all of the building materials for the carpenters, who completed most of the work on the site. On rare occasions when they needed special tools, the carpenters would take work home to complete.

Campbell maintained a constant presence at the construction site. He laid out work for the carpenters by measuring and snapping chalk lines for walls and instructed the carpenters on how to correct work not done properly. Campbell claims that he also did the layout work for the electrical and plumbing contractors. Both Griffin and Maurer often encouraged Campbell to complete the layout so that they could finish their portion and promptly move on to their next project.

Neither Griffin nor Maurer signed a contract for their work on this project. They reviewed the carpentry portion of Campbell's budget for the project and agreed to work for that amount. Upon completion of their portion of the project, Griffin and Maurer each submitted a bill in the name of their company, with a general description of the work they completed. If the work they agreed on took longer to complete then anticipated, they were still paid the price agreed upon If Campbell requested that Griffin and Maurer perform additional work, they submitted a bill and Campbell paid them for the extra work. They each carried Commercial General Liability insurance and signed statements that they were independent contractors. Griffin also carried worker's compensation insurance.

Campbell filed a charge alleging that the Union's picket was unlawful secondary conduct because the primary dispute was with the carpenters. The Region has concluded that if the carpenters are Campbell's employees, then the picketing was lawful. However, if the carpenters are independent contractors, the Region will issue a complaint alleging that the picketing violated Section 8(b)(4)(ii)(B).

## ACTION

We conclude that the carpenters are independent contractors.

Section 2(3) of the Act excludes from the definition of employee "any individual having the status of an independent contractor." In determining whether individuals are employees or independent contractors, the Board applies the common-law test of agency.<sup>2</sup>

The Board recently reiterated its position that the common-law agency test encompasses a careful examination of all factors and not just those that involve a "right to control". The Board emphasized that, "Not only is no one factor decisive, but the same factors in one case may be unpersuasive when balanced against a different set of opposing factors."

Applying the common-law test of agency, we find that the factors weigh heavily in support of finding Campbell's carpenters to be independent contractors. Initially, it is obvious that Campbell and the carpenters did not intend to create an employer-employee relationship. Griffin and Maurer operated independent companies and billed Campbell in the name of those companies. They set their own work hours, worked for other builders, left the site to do other work, and encouraged Campbell to get the layout completed so that they could complete the work and move on to their next project. Moreover, unlike employees, Campbell paid them only for work completed regardless of their time involved.

The fact that Campbell required both Griffin and Maurer to carry General Commercial Liability insurance is further indication that the parties did not intend to create an employee-employer relationship. Campbell wanted Griffin and Maurer to indemnify him for any claims that might occur as a result of their work. In contrast, an employer would normally assume the risk for any such claims arising out of an employee's work.<sup>5</sup>

 $^{2}$  See Restatement (Second) of Agency § 220(2)(1958).

 $<sup>^3</sup>$  Roadway Package System, Inc., 326 NLRB 842, 849-850 (1998) (citations omitted). See also Standard Oil Co., 230 NLRB 967, 968 (1977).

 $<sup>^4</sup>$  Id., 326 NLRB at 850, citing <u>Austin Tupler Trucking</u>, 261 NLRB 183, 184 (1982).

<sup>&</sup>lt;sup>5</sup> See <u>Dial-A-Mattress</u>, 326 NLRB 884, 891, where owner-operators were required to carry similar insurance.

The length of time that the carpenters worked for Campbell also indicates that the carpenters were independent contractors. The carpenters agreed to do specific work and only remained employed by Campbell until that particular part of the project was completed.

Furthermore, the fact that the carpenters were free to decline work assignments shows that they "enjoy certain freedoms and bear certain risk ... more consistent with the operations of an independent business." When Campbell needed someone to complete Solverson's work, he approached Griffin and Maurer as businessmen to see if they would do it. Griffin and Maurer reviewed what was left to be done, quoted Campbell a price, and he agreed. This negotiation is strong evidence that Griffin and Maurer were independent contractors. If they were employees, Campbell could have simply ordered them to do the work.

The carpenters also possessed the skills, knowledge, and equipment to operate as independent contractors. Campbell needed carpenters who were not just professionals, but specialists. Griffin and Maurer are engaged in the distinct business occupation of inside finish carpentry and possessed the skills and knowledge required for the job. Moreover, they arrived with the necessary tools to perform the specialized work, and even took work home when they needed special tools, not present at the job site, to complete a task.

Finally, although it would appear that Campbell did retain a certain degree of the "right to control" over the details of the carpentry work, the control he exercised was over the result, and not the means and manner of the carpenters' performance of their work. Campbell was frequently on the site, provided all of the materials, oversaw the work, and directed the carpenters to correct work that he thought was wrong. Nevertheless, Campbell was only providing broad direction and reviewing completed portions of the work. He did not instruct the carpenters in the selection of their tools, the method for installing the walls or the types of nails required. Nor did he provide any instruction on how they should perform the actual carpentry work. Campbell allowed Griffin and Maurer to perform their work as skilled professional carpenters, and he was only concerned with the layout and end result of the assignments. Thus, since Campbell did not retain the right to control the means and manner in which the

<sup>&</sup>lt;sup>6</sup> See <u>Dial-A-Mattress</u>, 326 NLRB 884(1998).

carpenters performed the work, but only the final result, this factor also supports a finding that the carpenters are independent contractors.<sup>7</sup>

In any event, even if Campbell did reserve the "right to control" the means and manner of the work, the Board has stated that no one factor is determinative. Therefore, in light of all the factors which point to Griffin and Maurer's independence from Campbell, we conclude the carpenters are independent contractors.

B.J.K.

 $^{7}$  See Carpet Center, <u>Inc.</u>, 170 NLRB 633, 634-635 (1968).

 $<sup>^{8}</sup>$  Roadway Package System Inc., 326 at 850, citing United Insurance, 390 U.S. at 258.